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Gary Bivins v. Pennsylvania Board o

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4115

GARY BIVINS,
Appellant

v.

PENNSYLVANIA BOARD OF PROBATION & PAROLE

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 3-01-cv-02451)
District Judge: Honorable Richard P. Conaboy

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B)
or Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
March 19, 2009

Before: McKEE, FISHER and CHAGARES, Circuit Judges

(Filed: April 23, 2009)

OPINION

PER CURIAM

On June 19, 2003, this Court, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), dismissed as frivolous appellant Gary Bivins' appeal from the District Court's dismissal of his original case for lack of merit. Bivins, proceeding pro se, then filed on August 25, 2008,

a motion for reconsideration of and a return of the filing fees paid to both the District Court and this Court in his original case. In his motion, he argued that the filing fee provisions of the Prison Litigation Reform Act (“PLRA”) did not apply to “habeas corpus challenges to the parole procedures, such as the one petitioner filed” in his original case. The District Court denied his motion on September 2, 2008, noting that this Court had held that Bivins’ original complaint was, in fact, a 42 U.S.C. § 1983 action, and not a 28 U.S.C. § 2254 habeas corpus petition. Bivins then filed the instant appeal on October 3, 2008, and this Court granted his IFP motion.

We have appellate jurisdiction over this appeal under 28 U.S.C. § 1291, and review it for possible dismissal under 28 U.S.C. § 1915(e)(2)(B). An appeal must be dismissed under 28 U.S.C. § 1915(e)(2)(B) if it has no arguable basis in law or fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989). Because we determine that the appeal is lacking in arguable legal merit, we will dismiss it under 28 U.S.C. § 1915(e)(2)(B).

The District Court is correct that this Court determined Bivins’ original complaint was a § 1983 action. In our per curiam opinion, this Court stated: “Bivins argues that the District Court misconstrued his complaint and argues that the District Court ‘sought to evade . . . the real nature’ of his cause of action by labeling it either a § 1983 or a § 2254 action. We disagree . . . Here, the substance of Bivins’ complaint indicates that the District Court properly construed it as filed pursuant to § 1983.” Furthermore, 28 U.S.C. § 1915 makes clear that filing fees shall be assessed, and makes no provision for a refund

of such fees. See 28 U.S.C. § 1915(b)(1)(“[I]f a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee.”).

As a result, we determine that Bivins’ appeal is lacking in arguable legal merit, and will dismiss it pursuant to 28 U.S.C. § 1915(e)(2)(B).